(2)

Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

No. 96-734

In The

Supreme Court of the United States

October Term, 1996

DONNA PATTERSON and NICHOLAS BROWN,

Petitioners,

v.

P.H.P. HEALTHCARE CORPORATION and MARK KENNEDY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GARY L. INGRAM
DAVID C. MYERS
(*Counsel of Record*)
THOMAS M. LIPOVSKI
JACKSON & WALKER, L.L.P.
901 Main Street, Suite 6000
Dallas, TX 75202
(214) 953-6036

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

85pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court will grant certiorari to consider Petitioners' contention that the court below imposed a "heightened evidentiary requirement" to support a damages award for emotional injury, when the opinion below imposed no such requirement but, rather, analyzed the facts of this case in accordance with the rules of decisions of this Court and of other circuits.

2. Whether this Court will grant certiorari to consider Petitioners' contention that, under 42 U.S.C. §§ 1981, 1981a, punitive damages must be assessed against an employer in all cases, without exception, whenever an individual project manager acts with malice towards the plaintiff employee, when the Fifth Circuit, in accordance with decisions of this Court and other circuits, considered the corporate employer's lack of knowledge or notice and the care taken by the corporate employer to protect its employees from discrimination in holding that punitive damages should not be imposed against the corporate employer under the facts of this case.

PARTIES TO THE PROCEEDINGS

Respondents, P.H.P. Healthcare Corporation and Mark Kennedy, are the Defendants.

Petitioners, Donna Patterson and Nicholas Brown, are the Plaintiffs.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

PROVISIONS OF LAW INVOLVED 1

STATEMENT OF THE CASE 1

A. Factual Background 1

B. District Court Proceedings 4

C. Court of Appeals Proceedings 6

REASONS FOR DENYING THE PETITION 6

A. THE DECISION BELOW IS IN ACCORDANCE WITH SUPREME COURT AUTHORITY AND DOES NOT IMPOSE A "HEIGHTENED EVIDENTIARY REQUIREMENT." 6

B. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUITS 12

C. THE DECISION BELOW IS CONSISTENT WITH THE EEOC'S INTERPRETATION OF THE CIVIL RIGHTS ACT OF 1991 18

D. THE DECISION BELOW CORRECTLY HOLDS THAT FACTORS OTHER THAN A MANAGER'S CONDUCT MAY BE CONSIDERED WHEN DETERMINING WHETHER TO AWARD PUNITIVE DAMAGES AGAINST A CORPORATE EMPLOYER 19

TABLE OF CONTENTS – Continued

Page

E. THE OTHER CIRCUITS CONSIDER FACTORS OTHER THAN A MANAGER'S CONDUCT WHEN DETERMINING WHETHER TO AWARD PUNITIVE DAMAGES AGAINST A CORPORATE EMPLOYER..... 23

CONCLUSION 29

TABLE OF AUTHORITIES

Page

FEDERAL CASES

BMW of N. Am., Inc. v. Gore, ___ U.S. ___, 116 S. Ct. 1589 (1996) 6

Biggs v. Village of Dupo, 892 F.2d 1298 (7th Cir. 1990) 9, 15, 16, 19

Block v. R.H. Macy & Co., 712 F.2d 1241 (8th Cir. 1983) 27

Bolden v. Southeastern Pa. Transit Auth., 21 F.3d 29 (3rd Cir. 1994) 13

Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042 (1978) 7, 8, 9, 15, 17

Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984) 17

Chicago v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086 (7th Cir. 1992), *cert. denied*, 508 U.S. 972, 113 S. Ct. 2961 (1993) 26

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 114 S. Ct. 2396 (1994) 9

DeNieva v. Reyes, 966 F.2d 480 (9th Cir. 1992) 17

Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015, 106 S. Ct. 1197 (1986) 15, 17, 26

Farpella-Crosby v. Horizon Health Care, 97 F.3d 803 (5th Cir. 1996) 11, 18

TABLE OF AUTHORITIES – Continued

Page

Farrar v. Hobby, 506 U.S. 103, 113 S. Ct. 566 (1992) 8

Fitzgerald v. Mountain States Tel. and Tel. Co., 68 F.3d 1257 (10th Cir. 1995) 24, 25

Fort v. White, 530 F.2d 1113 (2nd Cir. 1976) 26

Gore v. Turner, 563 F.2d 159 (5th Cir. 1977) 20

Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108 (3rd Cir. 1988), *cert. denied*, 492 U.S. 905, 109 S. Ct. 3213 (1989) 13

Hamilton v. Svatik, 779 F.2d 383 (7th Cir. 1985) 26

Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344 (7th Cir. 1995) 26

Secretary, HUD on behalf of Herron v. Blackwell, 908 F.2d 864 (11th Cir. 1990) 17

Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1986) 26

Johnson v. Hale, 940 F.2d 1192 (9th Cir. 1991) 9, 16

Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S. Ct. 1716 (1975) 21

Jones v. Western Geophysical Co., 761 F.2d 1158 (5th Cir. 1985) 20

Jordan v. Medley, 711 F.2d 211 (D.C. Cir. 1983) 22

Kimzey v. Wal-Mart Stores, Inc., 907 F. Supp. 1309 (W.D. Mo. 1995) 27, 28

Koopman v. Water District No. 1 of Johnson County, Kan., 41 F.3d 1417 (10th Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S. Ct. 420 (1995) 16

TABLE OF AUTHORITIES – Continued

Page

Marr v. Rife, 503 F.2d 735 (6th Cir. 1974) 26

Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 106 S. Ct. 2537 (1986) 9

Meritor Savings Bank, F.S.B. v. Vinson, 477 U.S. 57, 106 S. Ct. 2399 (1986) 21, 22

Meyers v. City of Cincinnati, 14 F.3d 1115 (6th Cir. 1994) 17

Miller v. Apartments and House of N.J., Inc., 646 F.2d 101 (3rd Cir. 1981) 26

Mitchell v. Keith, 752 F.2d 385 (9th Cir.), *cert. denied*, 472 U.S. 1028, 105 S. Ct. 3502 (1985) 28

Morgan v. Secretary of Housing and Urban Dev., 985 F.2d 1451 (10th Cir. 1993) 9, 16

Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021, 102 S. Ct. 1719 (1982) 15, 16

Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978) 9

Price v. City of Charlotte, N.C., 93 F.3d 1241 (4th Cir. 1996) 9, 13, 14

Ragin v. Henry Macklowe Real Estate Co., 63 F.3d 898 (2nd Cir. 1993) 17

Rodgers v. Fisher Body Div., Gen. Motors Corp., 739 F.2d 1102 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054, 105 S. Ct. 1759 (1985) 9, 14

Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993) 25

Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625 (1983) 22

Spence v. Board of Educ. of Christina Sch. Dist., 806 F.2d 1198 (3rd Cir. 1986) 12, 13

Splunge v. Shoney's, Inc., 97 F.3d 488 (11th Cir. 1996) 23, 24

TABLE OF AUTHORITIES – Continued

Page

United States v. Balistrieri, 981 F.2d 916 (7th Cir. 1992), *cert. denied*, 510 U.S. 812, 114 S. Ct. 58 (1993) 15

Williams v. Trans World Airlines, Inc., 660 F.2d 1267 (8th Cir. 1981) 16

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 ..... *passim*

42 U.S.C. § 1981a 1

42 U.S.C. § 1983 5

42 U.S.C. § 2000e-3 5

OTHER SOURCES

POLICY GUIDE ON COMPENSATORY DAMAGES UNDER 1991 CIVIL RIGHTS ACT, 8 FAIR EMP. PRAC. MANUAL § 405:7096 (BNA 1992) 18

RESPONDENTS' BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondents, P.H.P. Healthcare Corporation and Mark Kennedy, respectfully request that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals [Resp. App. A] is reported at 90 F.3d 927. Its order denying rehearing [Resp. App. C] is not reported. The findings of fact and conclusions of law of the district court [Resp. App. B] are not reported.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

42 U.S.C. § 1981 and 42 U.S.C. § 1981a.

STATEMENT OF THE CASE

A. Factual Background

P.H.P. Healthcare Corporation ("PHP") provided psychiatric services to the United States Army at Darnall Army Community Hospital in Fort Hood, Texas, pursuant to a federal contract. [R. 1060]. PHP hired Mark

Kennedy as project manager, and Petitioner Donna Patterson ("Patterson," a white female) as head nurse. Petitioner Nicholas Brown ("Brown," a black male) was hired as a mental health technician. [R. 1282].

During the period of Petitioners' employment, PHP, as a government contractor, maintained an Affirmative Action Plan which monitored minority hiring, training and promotions. [Tr. 509]. The evidence was undisputed that PHP, at all times, met its federally mandated Affirmative Action Plan requirements for hiring minority employees in Brown's position. [Tr. 510-13; D-Exs. 2, 3].

Brown's employment at PHP was marked by excessive absences, tardiness, and other inappropriate behavior, and he received numerous disciplinary warnings from his supervisors (some of whom were black), as well as from Patterson. According to Patterson's written warning to him, Brown's transgressions included a pattern of calling in sick before and after scheduled days off and failing to work shifts as agreed. [D-Ex. 56].

On July 30, 1992, Brown applied for a full-time position at another hospital, Metroplex, and, on September 1, 1992, he was hired by Metroplex for a position comparable to (and with higher wages than) his job at PHP. [Tr. 428, 488, 500]. Three days later, he submitted his resignation letter to PHP. [D-Ex. 76]. In April 1993, he was fired by Metroplex for excessive absenteeism, spending excessive time on personal phone calls, and conflicts with the nursing staff. [Tr. 501].

The district court found that Kennedy used racial slurs against blacks. Brown's own testimony, however, established that such slurs were not directed toward him

or made in his presence. [Tr. 414, 484-85]. In fact, Brown was unaware of the use of such language until two weeks before he resigned, and even then, Brown had only secondhand knowledge that on one occasion Kennedy had allegedly used a racial slur. [Tr. 415]. Neither Brown nor Patterson ever reported to PHP executives that Kennedy had used such language. [Tr. 190-91]. The evidence was undisputed that PHP does not condone such conduct, does not tolerate discrimination and maintains a strict policy against any type of harassment or discrimination. [D-Ex. 11]. Notice was given to all employees that complaints of harassment or discrimination could be brought to the attention of the EEO officer. [Tr. 517]. Brown did not register a complaint with PHP nor did he file an EEOC complaint at any time during or after his employment. [R. 1145].

Patterson's employment also was marked by absences, tardiness, and other inappropriate behavior. [Tr. 179-181, 242, 338-39, 514]. She had been given several verbal warnings in the months preceding her termination. [Tr. 242, 339, 514]. Then, shortly before her termination, Patterson – the head nurse – took a three-hour lunch, asked an employee to lie for her, reported to work late on one occasion, and completely failed to report for her scheduled shift on another (on which occasion a patient escaped). [Tr. 177-78, 181, 344-47]. Kennedy brought these and other problems concerning Patterson to the attention of Dilip Chaparrala, the medical director, and John Bucur, the personnel director. Bucur authorized Patterson's termination based on her misconduct. [Tr. 515-16]. Petitioners say that Patterson then had to endure a "full year's unemployment" (Pet. 5), but, in fact, she promptly

found employment with another hospital. After one month, however, her new employer gave her the option of resigning or being terminated because of excessive absences. [Tr. 502].

The district court found that Patterson was terminated from PHP in retaliation for opposing discrimination by Kennedy. Patterson, however, did not express any complaints about racial discrimination or the use of racial slurs by Kennedy to PHP corporate personnel either before or after her termination. [Tr. 138, 140, 183-87; D-Exs. 94, 102, 110].[1] It is undisputed that Bucur was unaware of any alleged racial discrimination or harassment. [Tr. 515-16].

B. District Court Proceedings

This case began as a state court action by Petitioners alleging that the principal motivation for their alleged terminations was retaliation for reports made by them concerning PHP's alleged violation of PHP's government contract. [R. 9-12]. They further alleged violations of their civil rights. [R. 13-15]. PHP removed the case to federal

---

[1] Petitioners point to testimony from Patterson that in July 1991, Kennedy warned black employees that he would not tolerate EEOC complaints, and that in March 1992, Kennedy allegedly ordered her not to hire any more blacks. [Pet. 2-3]. Patterson, however, filed no complaint at that time and did not report the alleged incidents to anyone. [Tr. 188-89]. In fact, in March 1992, Patterson wrote PHP praising Kennedy for his management of the program, stating: " . . . I can say with all honesty that I have never worked with anyone as dedicated to his work and the people whom he represents as Mark." [D-Ex. 94].

court, where both Petitioners filed amended complaints. Patterson alleged PHP terminated her employment for reports she made about alleged contract violations and further contended that her termination violated 42 U.S.C. § 2000e-3 in that it was in retaliation for opposing racially discriminatory practices. Brown's amended complaint alleged causes of action under 42 U.S.C. §§ 1981 and 1983, the Texas and U.S. Constitutions, and for retaliation for exercising his free speech rights related to the alleged contractual abuses. The district court, Honorable Walter S. Smith, granted Respondents' motion for summary judgment as to all claims except two – Brown's claim under 42 U.S.C. § 1981 and Patterson's claim under 42 U.S.C. § 2000e-3. After a two-day bench trial, the district court ruled for Petitioners on those claims. The judgment (after two amendments) was that Patterson recover $340,000.00 ($40,000 in back pay; $150,000 for mental anguish; $150,000 for punitive damages) against PHP and that Brown recover $212,634.00 ($22,648 in back pay; $40,000 for mental anguish; $150,000 for punitive damages) against Kennedy and PHP, plus attorneys' fees subsequently awarded in the amounts of $36,000 to Patterson and $68,898.84 to Brown.[2] [Resp. App. D].

---

[2] The judgment was amended twice. The first amended judgment imposed liability in favor of Brown and Patterson against Kennedy jointly and severally with PHP. [R. 1371]. The second amended judgment vacated Patterson's judgment against Kennedy, but did not otherwise change the first amended judgment. [R. 1405].

C. Court of Appeals Proceedings

The Fifth Circuit affirmed liability as to Brown's race discrimination claim, Patterson's retaliation claim, and both Petitioners' attorneys' fee awards. The court held that Brown (whose own conduct caused his termination from subsequent employment) failed to mitigate his damages, and, thus, vacated his back pay award and remanded it for redetermination. Holding that neither Petitioner had presented "testimony and/or other evidence to show the nature and extent of emotional harm . . . ," the Fifth Circuit vacated the mental anguish awards as to both Petitioners with instructions for the district court to assess nominal damages. The court held Brown was entitled to punitive damages against Kennedy but, because the award did not comply with the factors set out by this Court in *BMW of N. Am., Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589 (1996), remanded with instructions for the district court to reassess the award.[3] Holding that there was no evidence in the record to support the district court's awards of punitive damages against PHP, the court reversed those awards and rendered judgment that PHP had no liability for punitive damages.

REASONS FOR DENYING THE PETITION

A. THE DECISION BELOW IS IN ACCORDANCE WITH SUPREME COURT AUTHORITY AND DOES NOT IMPOSE A "HEIGHTENED EVIDENTIARY REQUIREMENT."

The thrust of Petitioners' first point is that the Fifth Circuit insists on a "heightened evidentiary requirement"

---

[3] Since Patterson sued under Title VII, Kennedy was not individually liable to her for either actual or punitive damages.

to support an award for mental anguish damages. The Fifth Circuit imposed no such requirement – the words "heightened evidentiary requirement" are nowhere in the court's opinion. Rather, the court clearly stated that it applied the usual rules applicable to a review of a district court's findings of fact – i.e., that the appellate court will reverse such findings "only when, after weighing the evidence, we are definitely and firmly convinced that the district court made a mistake." [Resp. App. 9a].

Notwithstanding the Fifth Circuit's clear expression of its standard of review, Petitioners seek to construct a "heightened evidentiary requirement" by attributing to the Fifth Circuit the "view" that the victim's testimony "alone is not 'competent evidence' to support a [mental anguish damages] award." [Pet. 7]. Again, Petitioners find in the Fifth Circuit opinion a statement of the law which is not there, and, in fact, is refuted by the plain language of the opinion as follows:

> The Supreme Court has . . . required that compensatory damages such as emotional harm caused by the deprivation of constitutional rights may be awarded only when claimants submit proof of actual injury. *Carey v. Piphus*, 435 U. S. 247, 255-56, 98 S. Ct. 1042, 1048 (1978). Therefore, a claimant must present testimony and/*or* other evidence to show the nature and extent of emotional harm caused by the alleged violation.

[Resp. App.18a, emphasis added]. Thus, far from holding, as Petitioners contend, that a victim's testimony, by itself, may never support a mental anguish award, the Fifth

Circuit recognized and said that *testimony alone* – "testimony and/*or* other evidence" – indeed *can* be sufficient if that testimony shows "actual injury" and "the nature and extent of emotional harm caused by the alleged violation."[4] *Id.*

A claimant, of course, cannot recover damages unless the claimant presents competent evidence of actual injury. *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 573 (1992). This is because the purpose of an award of damages is to compensate persons for injuries sustained as a result of the violation of their legal rights. *Carey v. Piphus*, 435 U.S. 247, 254-57, 98 S. Ct. 1042, 1047-49 (1978). *Carey* instructs that "substantial damages should be awarded only to compensate actual injury. . . . " *id.* at 266, 98 S. Ct. at 1054, and further, that while compensatory damages for mental anguish are recoverable for constitutional violations, such damages may not be presumed. Moreover, a claimant's failure to prove compensatory damages with competent

---

[4] Petitioners say that "There is no dispute that petitioners presented preponderant evidence that they suffered actual injury as a result of their unlawful treatment." [Pet. 8]. If this statement means that there is no dispute that Petitioners sustained some *economic* loss, the statement is correct – Petitioners received damage awards for such losses and do not here complain of them. However, if (as the context of their statement would appear to indicate) Petitioners are saying that there is "no dispute" that Petitioners presented "preponderant evidence" of actual *emotional* injuries, the statement is egregiously wrong. Respondents vigorously contested the competency and sufficiency of Petitioners' evidence of emotional injury, and, of course, the Fifth Circuit squarely held that Petitioners' evidence on that subject was insufficient.

evidence allows recovery of only nominal damages, typically one dollar. *Id.* at 266-67, 98 S. Ct. at 1053-54. In *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537 (1986), this Court reaffirmed the teachings of *Carey* that to recover compensatory damages, a claimant must suffer actual, demonstrable injury. *Id.* at 307, 106 S. Ct. at 2543.

This Court has further recognized that emotional distress damages are fraught with vagueness and speculation, and are easily susceptible to fictitious and trivial claims. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396, 2408 (1994). Acknowledging the nebulous nature of such damages, federal courts carefully review mental anguish awards which are based solely on the claimant's testimony. *Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1246 (4th Cir. 1996). Thus, the courts require such damages to be proved by a "sufficient quantum of proof demonstrating the violation caused compensable injury." *Price*, 93 F.3d at 1246; *Perez v. Rodriguez Bou*, 575 F.2d 21, 25 (1st Cir. 1978) (stating courts are "not inclined to award compensatory damages for general mental [anguish] . . . or unexplained negative effects of" constitutional violations); *Rodgers v. Fisher Body Div., Gen Motors Corp.*, 739 F.2d 1102, 1108 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054, 105 S. Ct. 1759 (1985) (holding plaintiff's testimony did not demonstrate his mental distress with the specificity required by *Carey*); *Biggs v. Village of Dupo*, 892 F.2d 1298, 1304-05 (7th Cir. 1990) (requiring plaintiff to show "demonstrable emotional distress"); *Johnson v. Hale*, 940 F.2d 1192, 1193 (9th Cir. 1991) (noting plaintiffs provided "detailed and substantial" testimony to support their mental distress claim); *Morgan v.*

Secretary of Housing and Urban Dev., 985 F.2d 1451, 1459 (10th Cir. 1993) (requiring more than "mere assertions of emotional distress").

Petitioners contend that in the instant case "preponderant evidence was not good enough for the court below" – that "because there was no corroborating evidence of petitioners' emotional injuries, their testimony was not even deemed competent." [Pet. 9]. As the opinion makes clear, however, the reason Petitioners' testimony was deemed incompetent was that it was so vague and conclusory that it was not sufficient to establish the demonstrable emotional distress which the cases require, and, furthermore, the other evidence in the record not only did not corroborate, it refuted, Petitioners' claims that their alleged distress was caused by Respondents' purported discrmination.

Brown only presented subjective testimony, such as that he felt "real bad," "frustrated," "angry," and "uneasy," and that the "unbearable" working environment was "tearing my self-esteem down." As stated by the Fifth Circuit (Resp. App. 22a), he did not claim any specific discernable injury such as sleeplessness or depression. He did state that he had marital problems, which he attributed to having "no income" [Tr. 414-23], but it was undisputed, however, that three days after his resignation from PHP he went to work at another hospital at higher wages. Patterson testified that she was "bothered," had "worry," "concern," and "anxiety," but the problems, if any, that were caused by her discharge were never differentiated in her testimony from the stress she already was suffering from poor health (possible

lupus), a child custody dispute, and flashbacks from having witnessed a massacre at a local cafeteria. [Tr. 97, 100-01, 198-201, 360-64]. The Petition asserts [Pet. 15 n.4] that Patterson was troubled with "sleeplessness," but the testimony to which Petitioners apparently refer is her answer of "yes, sir," to the question whether she was bothered, "not only in the – in the day, but also sometimes at night when you were trying to sleep," by loss of income. [Tr. 97]. Patterson has recovered damages for loss of income. Finally, Patterson insisted at the trial that her new job was stressful because she was "working with some of those physic – psychiatric criminals." [Tr. 96]. However, she worked with psychotics at both her new job and her job with PHP – she was a psychiatric nurse.

The Fifth Circuit's recent decision in *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803 (5th Cir. 1996), clearly shows that the Fifth Circuit does not impose a "heightened evidentiary requirement" and will, in a proper case, affirm an award for mental anguish damages based on the plaintiff's testimony. The court there held that the evidence in that case, which, the court noted, went well beyond Patterson's and Brown's, was sufficient to show a "specific discernable injury to the claimant's emotional state" in the form of humiliation and stress. *Id.* at 808-09. The court did not require corroboration, expert medical testimony, or testimony regarding physical manifestations of harm, although some corroborating evidence was presented. Thus, the Fifth Circuit itself does not view the opinion in the instant case as creating a "heightened evidentiary requirement" requiring in all cases corroboration, proof of physical manifestations, or medical

evidence. Petitioners have no basis for urging this Court to grant certiorari to decide whether the Fifth Circuit required Petitioners to prove an actual injury by a "heightened evidentiary requirement."[5]

B. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUITS.

Petitioners argue that the Fifth Circuit has strayed from the other circuits by requiring corroborating evidence to support anything more than a nominal damage award. On the contrary, the holding below is consistent with the other federal circuits, which also carefully review damages awards based solely on a claimant's testimony, and hold that while a claimant's testimony alone may support an award of more than nominal damages for mental anguish, such testimony must be adequately developed and sufficiently articulated.

In *Spence v. Board of Educ. of Christina Sch. Dist.*, 806 F.2d 1198 (3rd Cir. 1986), which is cited by Petitioners, the Third Circuit significantly reduced a damage award because it was based on the conclusory testimony of the claimant that she was "depressed" and "humiliated." *Id.* at 1201. In reaching its decision, the court stated that the plaintiff offered no proof of physical or psychological

---

[5] Petitioners filed no petition for rehearing en banc in the Fifth Circuit. Patterson filed a petition for panel rehearing; Brown filed no petition for rehearing at all.

injury and that the testimony did not establish "a reasonable probability, rather than a mere possibility, that damages due to emotional distress were in fact incurred. . . ." *Id.* Likewise, in *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1120-22 (3rd Cir. 1988), *cert. denied*, 492 U.S. 905, 109 S. Ct. 3213 (1989), the Third Circuit reversed a mental anguish award where the only evidence supporting the award was the plaintiff's conclusory testimony that he was "very upset," "had been done wrong" and had been "treated unfairly."

Petitioners cite the Third Circuit's decision in *Bolden v. Southeastern Pa. Transit Auth.*, 21 F.3d 29 (3rd Cir. 1994), as rejecting the "heightened evidentiary requirement" allegedly adopted by the court below. In affirming the damages award, the *Bolden* court emphasized that the plaintiff, in contrast to *Gunby, supra*, presented corroborating evidence from four witnesses as to his emotional state. *Bolden*, 21 F.3d at 33. The court rejected the defendant's argument that damages were not recoverable *as a matter of law* in the absence of expert medical testimony, but that holding does not contradict the holding here which does not require expert medical testimony.

Similarly, the Fourth Circuit has determined that conclusory testimony by the claimant is not sufficient to support an award of damages for mental anguish. *Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1246 (4th Cir. 1996). The Fourth Circuit's decision in *Price* is quoted by Petitioners as follows:

> [W]e conclude that a plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress based on a constitutional violation. . . .

[Pet. 11]. Petitioners, however, failed to set forth the language immediately following their quotation, which is:

> **however, the testimony must establish that the plaintiff suffered demonstrable emotional distress, which must be sufficiently articulated; neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a constitutional violation occurred supports an award of compensatory damages.**

93 F.3d at 1254 (emphasis added). Explaining that the case law required the court to "scrupulously analyze an award of compensatory damages for a claim of emotional distress predicated exclusively on the plaintiff's testimony," *id.* at 1251, *Price* held that the evidence presented by the claimant was insufficient to support a compensatory damage award. The Fourth Circuit expressed "the same trepidation as our sister circuits regarding conclusory testimony" of mental anguish damages by the plaintiffs, "which did not indicate how their alleged distress manifested itself." *Id.* at 1254-55. Rejected as insufficient was testimony that the plaintiffs felt "humiliated," "betrayed," embarrassed," "devastated," and "deceived" by the discriminatory practices of the employer. *Id.* at 1255. Similarly, testimony that a plaintiff's "self-esteem went from rather high" was also deemed insufficient. *Id.*

Finding that the only evidence of mental stress was the plaintiff's own brief testimony that he was humiliated by having to go on welfare, the Sixth Circuit in *Rodgers v. Fisher Body Div., Gen. Motors Corp.*, 739 F.2d 1102, 1108 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054, 105 S. Ct. 1759 (1985), held the plaintiff's evidence was "too slight" to

sustain a high damages award. Similarly, in *Erebia v. Chrysler Plastic Prods. Corp.*, 772 F.2d 1250, 1259 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015, 106 S. Ct. 1197 (1986), the Sixth Circuit rejected as insufficient the plaintiff's proof that he was "highly upset" about being subjected to racial slurs. Noting that such testimony did not satisfy the specificity requirements of *Carey*, the court remanded to the district court with instructions to award nominal damages. *Id.*

The Seventh Circuit in *Biggs v. Village of Dupo*, 892 F.2d 1298 (7th Cir. 1990), held that "when the injured party provides the sole evidence [of mental distress], he must reasonably and sufficiently explain the circumstances of his injury and not resort to mere conclusory statements." *Biggs*, 892 F.2d at 1304. In *Biggs*, the claimant's testimony that he was "affected emotionally by being fired" and was "concerned over the idea of his family having to deal with his discharge" was rejected as insufficient. *Id.* Similarly, in *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021, 102 S. Ct. 1719 (1982), the claimants' statements that they were "very depressed," "despondent" and "humiliated" was not enough to establish injury. *Nekolny*, 653 F.2d at 1172-73. In the Seventh Circuit case of *United States v. Balistrieri*, 981 F.2d 916, 931 (7th Cir. 1992), *cert. denied*, 510 U.S. 812, 114 S. Ct. 58 (1993), a housing discrimination case cited by Petitioners (in which the award of emotional distress damages was $2,000 per plaintiff), the court applied the same rule that was articulated in *Biggs* and *Nekolny*, but, it concluded that the plaintiff's testimony regarding emotional distress was more detailed than that

which was found lacking in *Biggs* and *Nekolny*. Thus, that case does not assist Petitioners.

The Ninth Circuit requires more than conclusory evidence to support an award of damages for mental anguish. For example, in *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991), the Ninth Circuit emphasized that the plaintiffs provided "detailed and substantial" testimony to support their claim of actual emotional injury. *Id.* at 1193. In that case, the court noted that the plaintiffs also presented corroborating testimony. *Id.* at 1193-94. According to the Tenth Circuit, "[m]ore than mere assertions of emotional distress are required." *Morgan v. Secretary of Housing and Urban Dev.*, 985 F.2d 1451, 1459 (10th Cir. 1993).

Petitioners cite *Koopman v. Water Dist. No. 1 of Johnson County, Kan.*, 41 F.3d 1417 (10th Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S. Ct. 420 (1995), and *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267 (8th Cir. 1981), to show that a split in the circuits exists. *Koopman*, however, turned on the fact that the plaintiff had not established whether the plaintiff's alleged mental anguish was caused by a wrongful termination or by a denial of due process. *Id.* at 1420. In the absence of proof of causation, the court held that the district court was not required to instruct the jury on emotional distress damages caused by the denial of due process. *Id.* As for *Williams*, it simply points out that a claimant's testimony may be sufficient to establish mental anguish damages. *Id.* at 1273. This in no way conflicts with the decision below.

Citing cases from the Second, Sixth, Ninth, Eleventh and D.C. circuits, Petitioners argue the remaining circuits

implicitly reject an evidentiary standard that requires corroboration. [Pet. 12-13]. Those cases, however, show that the evidence of emotional distress from the claimant was far greater than that submitted by Petitioners here and, indeed, included testimony regarding the manifestations of the emotional harm. *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1119 (6th Cir. 1994) (claimant's psychological injuries had "physical effects" including weight loss and stomach problems for which he was prescribed medicine)[6]; *DeNieva v. Reyes*, 966 F.2d 480, 487 (9th Cir. 1992) (claimant's testimony indicated she suffered from dizziness and vomiting); *Secretary, HUD on behalf of Herron v. Blackwell*, 908 F.2d 864, 873 (11th Cir. 1990) (claimant testified about loss of sleep and headaches); *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1238 (D.C. Cir. 1984) (affirming an award of $3,000 for emotional injury as not unreasonable on the basis that the record supported the conclusion that the plaintiff suffered actual injury); *Ragin v. Henry Macklowe Real Estate Co.*, 63 F.3d 898 (2nd Cir. 1993) (affirming an award of $2,500 per plaintiff but holding the testimony insufficient to support a greater award because the plaintiffs did not show any manifestations of harm).

Far from establishing a new and "aberrant" [Pet. 6] evidentiary requirement, the Fifth Circuit's opinion in this case is consistent with the other circuits. The cases

---

[6] As shown at pages 14-15 hereof, the Sixth Circuit is committed to the rule, applied by the Fifth Circuit in the instant case, that an award of more than nominal damages will not be upheld when the plaintiff "has not demontrated his mental distress with the specificity required by *Carey v. Piphus.*" *Erebia*, 772 F.2d at 1259.

discussed above show that a claimant's testimony alone may be sufficient to support mental anguish damages when it is adequately developed, genuine, and sufficiently explained. There is no conflict among the circuits.

C. THE DECISION BELOW IS CONSISTENT WITH THE EEOC'S INTERPRETATION OF THE CIVIL RIGHTS ACT OF 1991.

Petitioners also contend the Fifth Circuit's holding is inconsistent with the EEOC's interpretation of the Civil Rights Act of 1991. They say the court below relied on the EEOC's policy guidance and decisions to conclude that a "victim's testimony alone is insufficient to support an award for emotional distress." [Pet. 14]. As discussed at page 7 hereof, the Fifth Circuit did not hold a victim's testimony could never be sufficient; it said that testimony alone – "testimony and/or other evidence" – can be sufficient, but that it was not sufficient in this case.

Petitioners also say the court below used the EEOC policy statement as a basis to require proof of "physical manifestations of emotional harm as a prerequisite for recovery." [Pet. 15]. The opinion below recognized, as did the *Farpella-Crosby* case, that the EEOC considers that emotional harm may manifest itself in both "physical manifestations" as well as "intangible injury". [Resp. App. 24a]. In any event, the EEOC policy guide and the court below are in agreement that "the existence, nature and severity of emotional harm must be proved." POLICY GUIDE ON COMPENSATORY DAMAGES UNDER 1991 CIVIL RIGHTS ACT, 8 FAIR EMP. PRAC. MANUAL § 405:7096 (BNA 1992). The policy itself discusses the different "manifestations" of

harm and lists numerous ways emotional harm may manifest itself, including physical manifestations. As shown above, Petitioners did not testify to any of the manifestations of harm or evidentiary factors listed by the EEOC. Petitioners suggest [Pet. 8] that an alleged hostile environment is itself proof of mental injury, but the EEOC policy statement provides, and the cases hold, that emotional injury may not be presumed. See *Biggs, supra* at 1305. (plaintiff must "show *'demonstrable* emotional distress,' not just point to circumstances of the constitutional violation which might support an inference of such injury.") (emphasis in original). Moreover, Brown disclaimed any right to damages based on a hostile environment. [Resp. App. 9a].

Finally, Petitioners rely on numerous cases cited in the EEOC policy guide to support their position that medical evidence is not a prerequisite for recovery. [Pet. 16]. Since the Fifth Circuit did not and does not require medical evidence, those cases do not conflict with the opinion below. The decision below is consistent with EEOC policy.

D. THE DECISION BELOW CORRECTLY HOLDS THAT FACTORS OTHER THAN A MANAGER'S CONDUCT MAY BE CONSIDERED WHEN DETERMINING WHETHER TO AWARD PUNITIVE DAMAGES AGAINST A CORPORATE EMPLOYER.

Petitioners' second point argues that the Fifth Circuit required Petitioners to provide "proof of malicious or reckless conduct of corporate officials" in order to recover punitive damages. [Pet. 19]. An examination of

the Fifth Circuit's decision, however, reveals that no such requirement has been imposed. Indeed, the court below recognized that "[i]t is well settled that a private employer may be held liable for punitive damages in employment discrimination cases under § 1981 based on the acts of supervisory employees." [Resp. App. 26a].

In reaching its decision, the court applied a standard of analysis that had been set forth more than a decade prior to this decision in *Jones v. Western Geophysical Co.*, 761 F.2d 1158 (5th Cir. 1985). In *Jones*, the Fifth Circuit held that when "determining whether punitive damages are appropriate . . . 'the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent' " should be considered. *Jones*, 761 F.2d at 1162 (*quoting*, e.g., *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977)). Considering those factors, the court in *Jones* affirmed a decision not to award punitive damages because "[f]irst, there was evidence that the company was taking steps to eliminate racial harassment [and] [s]econd, the evidence in the district court was at times quite ambiguous and *did not compel* the conclusion that [the corporate employer] had behaved maliciously." *Jones*, 761 F.2d at 1162 (emphasis added).

Similarly, when deciding whether punitive damages could be awarded in this case, the Fifth Circuit took into account the following factors: (1) Kennedy was the sole person responsible for taking any discriminatory action; (2) Kennedy was not a corporate officer of PHP, but was the project manager of the Fort Hood office; (3) PHP provided a handbook which established a policy of non-discrimination and which explained how to complain of discriminatory practices to the Company; (4) memos were

distributed throughout the Fort Hood facility detailing the procedures for making complaints to headquarters; (5) neither Brown nor Patterson followed the aforementioned procedures in an attempt to notify PHP of Kennedy's discrimination, and (6) there was no evidence in the record to show that PHP had knowledge of Kennedy's malicious or reckless conduct, or that it had authorized, ratified or approved of his actions. [Resp. App. 30-31a]. Based on *all* of the aforementioned considerations, the court concluded that "the evidence *in this case* does not compel the conclusion that PHP behaved in a manner which warranted the imposition of punitive damages." [Resp. 31a, n.15, emphasis added]. In short, the Fifth Circuit held that it is appropriate to consider the totality of the circumstances surrounding an act of discrimination when determining whether an employer should be held liable for punitive damages.

The opinion below is consistent with the teachings of this Court which hold that "[a]n individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, *under certain circumstances*, punitive damages." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460, 95 S. Ct. 1716, 1720 (1975) (emphasis added). This Court has further held that it is error to "entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case" when determining liability under Title VII. *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 73, 106 S. Ct. 2399, 2408 (1986). In *Meritor*, this Court noted that, while Congress "wanted courts to look to agency principles for guidance" with respect to

employer liability, "such common-law principles may not be transferrable in all their particulars to Title VII," since "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.*

A "key feature of punitive damages" is that they are "never awarded as of right, no matter how egregious the defendant's conduct. . . . Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss." *Smith v. Wade*, 461 U.S. 30, 52, 103 S. Ct. 1625, 1638 (1983). "Punitive damages are awarded in the jury's discretion 'to *punish* [the defendant] for his outrageous conduct and to *deter* him and others like him from similar conduct in the future.' " *Id.* at 54; 103 S. Ct. at 1639 (emphasis added). Thus, "[t]he focus is on the character of the tortfeasor's conduct – whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Id.* "That purpose is not served by the imposition of [punitive] charges upon a person who is responsible for the tort only vicariously, without any personal blame. . . . a principal will not be held liable for punitive damages for his agent's conduct without a showing that he 'participated in the doing of such wrongful act or had previously authorized or subsequently ratified it with full knowledge of the facts.' " *Jordan v. Medley*, 711 F.2d 211, 216 (D.C. Cir. 1983). For these reasons, a corporate employer can be held liable for compensatory damages based on the actions of its employees but liability for punitive damages is separate,

discretionary, and requires considerations besides the conduct of the employees themselves. There is no basis to grant certiorari on the ground that the Fifth Circuit has "distanced itself from the teachings of this Court" [Pet. 19] by taking into account the totality of the circumstances.

E. THE OTHER CIRCUITS CONSIDER FACTORS OTHER THAN A MANAGER'S CONDUCT WHEN DETERMINING WHETHER TO AWARD PUNITIVE DAMAGES AGAINST A CORPORATE EMPLOYER.

Petitioners' position on punitive damages is not merely that an employer *may* be liable for allegedly malicious conduct of an employer with managerial or supervisory authority, but, rather, that such employee's conduct *mandates* an award of punitive damages against a corporate employer in *every* case. Petitioners say that in failing to so hold the decision below is in conflict with other circuits. However, the other circuits have rejected that proposition.

In *Splunge v. Shoney's, Inc.*, 97 F.3d 488 (11th Cir. 1996), the district court found that an "area supervisor, with responsibility for multiple restaurants," a store manager, an assistant manager, and a dining room supervisor, all engaged in gender discriminatory activities and awarded compensatory and punitive damages against the employer. *Id.* at 489. The Eleventh Circuit determined that because the hostile environment was pervasive and the

offending employees were managers, constructive knowledge could be imputed to "higher management" for purposes of compensatory damages. *Id.* at 490. The Eleventh Circuit ruled, however, that the employer could not be held liable for punitive damages based solely on those managers' acts. *Id.* at 490-491. After reviewing the totality of the circumstances and noting that there was no evidence that "Shoney's failed to become aware of the hostile environment because of any established policy of willful blindness," and that "Shoney's had a general policy against . . . harassment and did investigate the complaints it received," the court declined to hold that "the state of mind of the harassing employees counts as the state of mind of Shoney's, the corporate employer, for punitive damages purposes". *Id.* at 491.

The Tenth Circuit also holds that an employer is not necessarily liable for punitive damages under section 1981 simply because the person responsible for the discrimination was an employee with sufficient authority to supervise or manage so as to make the employer liable for compensatory damages. In *Fitzgerald v. Mountain States Tel. and Tel. Co.*, 68 F.3d 1257 (10th Cir. 1995), the court held that "given [the employee's] role in the selection process of trainers," the actions of the employee could be attributed to the employer for purposes of awarding compensatory damages against the employer. *Id.* at 1263. The court, however, then held that "[p]unitive damages based solely on a respondeat superior theory are quite another matter." *Id.* Recognizing that "[a]ny intentional discriminatory conduct in this case occurred

at the hands of [the offending supervisor], not [the corporate employer]," the court conducted a two-part examination of the facts to determine whether there was sufficient evidence to support an award of punitive damages against the employer. *Id.* The court examined the "stature and authority of the agent . . . to set policy for the company" as well as whether the employer had conducted an investigation of the incident or ratified or approved the acts of the supervisor.[7] *Id.* at 1263-64. In spite of the fact that the offending supervisor had the final decision with respect to whether one of the plaintiffs would be awarded a contract, the court found that she was "not a manager with the type of authority necessary to impose vicarious liability on an employer for punitive damages." *Id.* at 1263-64. Based on the totality of the circumstances, the court remanded the case to the district court with instructions to dismiss the punitive damages claim. *Id.* at 1266.

Petitioners acknowledge that the Seventh Circuit has held that "a principal is liable for punitive damages for the discriminatory acts of her agent only if she knew of or

---

[7] Petitioners cite *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993), for the principle that if an individual "serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment, . . . the individual operates as the alter ego of the employer, and the employer is liable for the unlawful . . . practices of the individual without regard to whether the employer knew of the individual's conduct." *Id.* at 1125. However, in *Sauers*, the court was merely considering whether to affirm a judgment in favor of defendants on issues of liability, and did not even discuss the issue of whether the above quoted standard should be applied for punitive damages.

ratified the acts" (Pet. 21, n.7) (*citing Hamilton v. Svatik*, 779 F.2d 383, 389 (7th Cir. 1985); *Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1100 (7th Cir. 1992), *cert. denied*, 508 U.S. 972, 113 S. Ct. 2961 (1993)). The *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3rd 1344 (7th Cir. 1995) case also shows that the Seventh Circuit considers several factors when determining if a corporate employer may be held liable for punitive damages for the conduct of a mid-level employee. In deciding to uphold punitive damages awarded against an employer for sex discrimination under Title VII, the *Hennessy* court considered both the fact that plaintiff's supervisor had acted with reckless indifference to the female plaintiff's rights *and* testimony of Penril's president that he did not want to hire women in the field.[8] *Id.* at 1354.

Likewise, the Second, Third, and Sixth Circuits have all held that an employer is liable for punitive damages for the conduct of his employee-agent when there is evidence that the employer was by action or knowledgeable inaction, involved in the wrongdoing, or that the employer authorized, ratified or approved the acts complained of. See *Fort v. White*, 530 F.2d 1113, 1117 (2nd Cir. 1976); *Marr v. Rife*, 503 F.2d 735, 744-45 (6th Cir. 1974); *Miller v. Apartments and Homes of N.J., Inc.*, 646 F.2d 101, 111 (3rd Cir. 1981).[9]

---

[8] *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417 (7th Cir. 1986), cited by Petitioners, is not in conflict with the court below. Review of that case shows the court considered numerous factors including the corporate employer's failure to take remedial measures after learning of the harassment.

[9] The *Erebia* case, *supra*, confirms the lack of a conflict among the circuits. There, the court affirmed the jury's award

Petitioners claim *Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241 (8th Cir. 1983), stands for the proposition that courts have rejected an argument that "it is not appropriate to award punitive damages against a corporate defendant in the absence of evidence 'that the executive decision makers were racially motivated or biased.' " [Pet. 21]. In fact, the Eighth Circuit applied the same analysis that was applied by the Fifth Circuit, but simply came to a different conclusion under the facts of that case. Factored into the decision to award punitive damages was the company's knowledge of racial bias and failure to investigate. *Id.* at 1247.

Also instructive in the Eighth Circuit is *Kimzey v. Wal-Mart Stores, Inc.*, 907 F. Supp. 1309 (W.D. Mo. 1995), another decision cited by Petitioners. When discussing the issue of whether the jury's decision to award punitive damages should be overturned, the district court did not rely solely on agency principles, despite the fact that one of the offending employees had control over the terms and conditions of employment. *Id.* at 1313-14. Instead, the court noted that the plaintiff had complained about the harassment, that the corporate employer had failed to conduct an adequate investigation, and that the employer had offered the plaintiff alternative positions which did not have the same benefits and hours as plaintiff's prior

---

for punitive damages, holding that it was supported by substantial evidence, but the court took into account the plaintiff's attempt to invoke investigatory procedures, the company's failure to investigate those claims properly and the threats made by the personnel manager to the plaintiff.

job. *Id.* at 1314. Thus, the court considered both the supervisor's and the company's conduct when determining whether to uphold punitive damages.

Petitioners also cite *Mitchell v. Keith*, 752 F.2d 385 (9th Cir.), *cert. denied*, 472 U.S. 1028, 105 S. Ct. 3502 (1985), for the principle that a corporate employer is vicariously liable for punitive damages brought about by the conduct of a manager or employee. [Pet. 19-20]. The court in *Mitchell*, however, articulated a permissive, rather than mandatory, test for punitive damages ("punitive damages also *may* be imposed, in the absence of proof of fault on the part of the corporation, when the wrongful actor is a managerial employee") and specifically noted that it was deciding the case based on California state law. *Mitchell*, 752 F.2d at 389-90 (emphasis added).

Petitioners seek to impose a standard of liability that would automatically impute liability for punitive damages to a corporate employer upon a finding of malicious conduct by a single managerial employee and abandon the totality of circumstances standard which has been followed in the Fifth Circuit and other circuits. Neither Title VII nor Section 1981 nor the circuits would require the imposition of such a *per se* standard.

CONCLUSION

This case raises no issue worthy of review by this Court. Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

GARY L. INGRAM
DAVID C. MYERS
(*Counsel of Record*)
THOMAS M. LIPOVSKI
JACKSON & WALKER, L.L.P.
901 Main Street, Suite 6000
Dallas, TX 75202
214/953-6036
Fax: 214/953-5822
Texas Bar No. 14759400

Counsel for Respondents